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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 239

HARTFORD ACCIDENT & INDEMNITY COMPANY AND AETNA CASUALTY & SURETY COMPANY, APPELLANTS,

vs.

N. O. NELSON MANUFACTURING COMPANY, ASSIGNEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT OPPOSING JURISDICTION, MOTION TO DISMISS OR AFFIRM, AND BRIEF IN SUPPORT THEREOF.

GERARD BRANDON,
GERARD H. BRANDON,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 239

HARTFORD ACCIDENT & INDEMNITY COMPANY AND AETNA CASUALTY & SURETY COMPANY, APPELLANTS,

vs.

N. O. NELSON MANUFACTURING COMPANY, ASSIGNEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT OPPOSING JURISDICTION, MOTION TO DISMISS OR AFFIRM, AND BRIEF IN SUPPORT THEREOF.

In pursuance of Paragraph 3 of Rule 12 of the Supreme Court, the appellee, N. O. Nelson Mfg. Co., assignee, herewith files with the Clerk of the Supreme

Court of the United States its statement of matters making against the jurisdiction of the Court on appeal (said matters being assigned under the included motion to dismiss or affirm) and its motion addressed to the Court praying for a dismissal of the appeal or affirmance of the judgment and decree, to-wit:

Motion to Dismiss or Affirm.

Comes N. O. Nelson Mfg. Co., appellee in intervention, and moves to dismiss as to it or affirm for want of jurisdiction and for want of substantial Federal question, and for reasons assigns:

I.

The appeal addressed to the opinion and judgment of the Supreme Court of Mississippi in favor of appellee of date May 1st, 1933, presents nothing reviewable here. The judgment from which this appeal is sought to be had is not one where is drawn in question any constitutional rights or privileges of the appellants, but same was decided alone upon non-Federal questions of local law and of State procedure.

II.

The decree of the Chancery Court of Adams County, Mississippi, in favor of appellee, of date August 8th, 1932, and the opinion and judgment of affirmance of the Supreme Court of Mississippi of date May 1st, 1933, were controlled, dictated, and required by the final opinions and judgments of the Supreme Court of Mississippi in this cause of dates February 23rd, 1931,

and June 15th, 1931, which latter judgments and opinions were final within the meaning of the Judicial Code, Sec. 237, amended (U. S. C. A., Title 28, Sec. 344), from which latter judgments and decrees the same appellants Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company were entitled to prosecute an appeal to the United States Supreme Court within the time provided by Act of February 13th, 1925, Ch. 229, Sec. 8, 43 Stat. 940; U. S. C. A. Title 28, Sec. 350, provided jurisdictional questions and issues were there involved, but from which said appellants did not perfect an appeal.

III.

There are no pleadings and/or proof in the transcript whereunder the judgment of the Supreme Court of Mississippi may be reversed.

IV.

That which was determined by the Supreme Court of Mississippi was only an interpretation of a local contract insofar as this appellee is concerned.

WHEREFORE this appellee, having not been served until June 12th, 1933, with a copy of appellant's jurisdictional statement and designation to print entire record, makes this motion, having specifically reserved its right so thus to do.

GERARD BRANDON,
GERARD H. BRANDON,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 239

HARTFORD ACCIDENT & INDEMNITY COMPANY, ET. AL., APPELLANTS,

vs.

N. O. NELSON MFG. CO., ASSIGNEE, APPELLEE.

APPELLEE'S BRIEF AND ARGUMENT ON MOTION TO DISMISS OR AFFIRM.

General Statement.

This cause had its inception in the Chancery Court of Adams County, Mississippi, wherein on the docket of that court it was numbered No. 5323. This suit was brought by the Natchez Investment Company, owner of the hotel building, against the building contractors, Burkes, building contract surety, Hartford Accident & Indemnity Company, and sundry laborers, mechanics, and materialmen, including appellee's assignor, under provisions of Chapter 128 of the Laws

of Mississippi of 1918 (Hemingway's Code of Mississippi, 1927, Secs. 2596-2603, inclusive), Sections 2274-2881, both inclusive, of the Mississippi Code of 1930. Thereafter this appellee intervened in said cause, being permitted so to do by virtue of said statutes and by decree of the court.

Only excerpts from the pleadings in this cause appear in this record, and, aside from the agreed statement of facts as to some issues, none of the record evidence in this cause has been included in the transcript of this record to the Supreme Court. The appellant has by its præcipe made a part of the record on this appeal the record in this same cause on the appeal attempted to be taken to the Supreme Court of the United States, being transcript of record in Cause No. 333, October Term, 1931, styled *"Hartford Accident & Indemnity Company, Appellant, v. O. L. Bunn, doing business as Bunn Electric Company, et als., Appellees."* We shall hereafter refer to that record as (No. 333, Tr. —).

This appellee intervened in the Chancery Court of Adams County, Mississippi, too late to have judgment rendered in its favor at the time judgments were rendered in favor of the other parties similarly situated in the litigation; but, as to the other parties whose rights were in every wise similar and determined by the same law and facts, the Supreme Court of Mississippi heard this cause, first, upon appeal of the Hartford Accident & Indemnity Company to settle principles involved (No. 333, Tr. 46), and, next, upon appeal on the merits (No. 333, Tr. 67), and, finally, upon a suggestion of error (No. 333, Tr. 86).

In the meantime the Supreme Court of the State of Mississippi had heard this same cause as to the intervention of this appellee to settle principles involved, and had affirmed the Chancery Court and remanded the cause (see reference in opinion of Mississippi Supreme Court here appealed from), and, pending the appeal to the United States Supreme Court (Appeal No. 333, October Term, 1931), no further proceedings were had as to the intervention of this appellee in the Chancery Court of Adams County, Mississippi.

From the final judgment and decree of the Supreme Court of the State of Mississippi (No. 333, Tr. 67 and 86), which judgments were similarly against both the Hartford Accident & Indemnity Company and the Ætna Casualty & Surety Company (as is the judgment in this instance), the Hartford Accident & Indemnity Company alone attempted to prosecute an appeal to the Supreme Court of the United States. As to that appeal this Court held that it had no jurisdiction and dismissed the appeal.

Hartford Accident & Indemnity Company v. *O. L. Bunn et al.*, 285 U. S. 169, 52 S. Ct. 354-357, 76 L. Ed. 685.

Thereafter the mandate of this Court in said cause was sent down to the Supreme Court of the State of Mississippi and the judgment and decree of the Supreme Court of Mississippi became final and binding upon the parties in this cause.

Thereafter this cause came on for trial in the Chancery Court of Adams County, Mississippi, and by agreement of the parties the entire record in this

cause, including all evidence, documentary and oral, and all judgments and decrees in said cause rendered, were offered in evidence and made a part of the record in the issues involving the rights of this appellee.

Thereupon the Chancery Court of Adams County, Mississippi, rendered its judgment in favor of appellee, of date August 8, 1932, and, upon consideration upon appeal, the Supreme Court of Mississippi rendered its opinion on appeal, dated May 1, 1933, from which this appeal is prosecuted.

POINT I.

In the judgment and opinion from which this appeal is sought there is not brought in question any constitutional right or privilege of appellants, but same turns alone upon non-Federal questions of local law and State procedure.

This is apparent from a mere reading of the opinion of the court.

To give the Supreme Court jurisdiction of a writ of error (appeal) to a State court it must appear affirmatively not only that a Federal question was presented for decision, but that its decision was necessary to the determination of the case, and that it was actually decided, or that the judgment as rendered could not have been rendered without deciding it.

Adams v. *Russell,* 229 U. S. 353, 33 S. Ct. 846, 57 L. Ed. 1224, and cases therein cited.

Where there is involved both a Federal and non-Federal question and where the decision complained of rests on independent grounds not involving Federal

question and broad enough to maintain the judgment, the writ of error (appeal) will be dismissed by this Court without considering any Federal question that may also be presented.

Williams v. *Oliver,* 53 U. S. (12 How.) 111, 13 L. Ed. 915;

Petrie v. *Nampa, etc., Irrigation District,* 248 U. S. 154, 39 S. Ct. 25, 63 L. Ed. 178;

Farson v. *Bird,* 248 U. S. 268, 39 S. Ct. 111, 63 L. Ed. 233.

Even though the State court had based its judgment upon a Federal question as well as upon the ground upon which the decision turned, the Supreme Court is here without jurisdiction.

People ex rel. Doyle v. *Atwell,* 261 U. S. 591, 43 S. Ct. 410, 67 L. Ed. 814.

> "If it appears that the Judgment of the State Court against the Plaintiff in error was based upon a decision of general law broad enough to support the decision, this Court will not consider the Federal question though it was considered and determined by the Court below adversely to the Plaintiff in error."
>
> *Consolidated Turnpike Co.* v. *Norfolk, etc., R. R.,* 228 U. S. 596, 33 S. Ct. 605, 57 L. Ed. 982.

In discussing its jurisdiction upon a Federal question this Court in the case of *Bilby* v. *Stewart,* 246 U. S. 255, 38 S. Ct. 264, 62 L. Ed. 701, held:

> "We need not, however, consider this contention. For since the Supreme Court rested

its judgment upon a non-Federal question adequate to support it, the existence of a Federal question is of no significance." Citing *Cuyahoga Power* v. *Northern Realty Co.*, 244 U. S. 300, 37 S. Ct. 643, 61 L. Ed. 1153.

McCoy v. *Shaw*, 277 U. S. 302, 48 S. Ct. 519, 72 L. Ed. 891.

POINT II.

The judgments and opinions of the Supreme Court of Mississippi of dates February 23rd and June 15th, 1931 (No. 333, Tr. 67 and 86), were final within the meaning of the Judicial Code, Sec. 237, and when no appeal was perfected therefrom same became the law of the case and binding upon the parties hereto and upon the Mississippi courts in this cause.

For consideration of this point reference is made to the foregoing general statement.

The said Judgments (No. 333, Tr. 67 and 86) and the Mandate of this Court were binding upon the Chancery Court of Adams County, Mississippi, and the Supreme Court of Mississippi. The parties hereto agreed that said Judgment should be considered in evidence in the trial of the cause before the Chancery Court of Adams County, Mississippi, involving the rights of this Appellee (see Agreed Statement as to evidence and record). The issues involved had been decided and the decision had become final from which no appeal could be taken to the Supreme Court of the United States. The Chancery Court of Adams County, Mississippi, in view of said Judgments and Opinions and the Mandate of the Supreme Court of the United

States could not do other than render that Judgment for this Appellee nor could the Supreme Court of the State of Mississippi on appeal do otherwise. Such is the jurisprudence, practice and procedure of the State of Mississippi long established.

> "An opinion rendered on a former appeal becomes the law of the case and governs subsequent appeals."
>
> *Kellogg* v. *King*, 114 Miss. 375, 75 So. 134.

In that case the court stated:

> "The opinion heretofore rendered in this case conclusively settles several points of law now argued afresh, and we must follow the law of the case as announced on the first appeal. The conclusions reached by the Court are sound regardless of any law of the case doctrine."

In the case of *New York Life Insurance Company* v. *McIntosh* (Miss.), 46 So. 401, the Supreme Court of Mississippi said:

> "This is the third time this case has been here. It was distinctly held in its second appearance in this Court (41 So. 381) that the state of facts shown on this last appeal would constitute an estoppel against the insurance company; whether that decision was right or wrong, and we think it is right, it is the law of this case."

See also:

Adams v. *Yazoo, etc., R. R.*, 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33.

Bridgeforth v. *Gray*, 39 Miss. 136.

Stewart v. *Stebbins*, 30 Miss. 66.

Johnson v. *Success Brick Mfg. Co.*, 104 Miss. 217, 62 So. 4.

Green v. *McDonald*, 13 S. & M. 445.

Reed, Tax Collector, v. *Norman Breaux Lumber Co.*, 149 Miss. 395, 115 So. 724.

G. & S. I. R. Co. v. *Simmons*, 152 Miss. 327, 27 So. 144.

Pennington v. *Purcell*, 155 Miss. 554, 125 So. 779.

In the case of *Boothe* v. *Teche Lines, Inc.*, reported in 143 So. 418, which was one of several companion cases arising out of the same automobile accident, the Supreme Court of Mississippi said:

> "This is a companion case to *Teche Lines, Inc.*, v. *Passavanti* (Miss.) 140 So. 677. * * * The evidence in the present case and that is substantially the same in all respects. * * * We held in the Passavanti case, which, as stated, was in all substantial facts the same as this insofar as the question of liability is concerned, that appellant in that case was not entitled to a directed verdict of no liability. The court *en banc* thoroughly considered the question in that case and reached the conclusion that the issue of liability was one for the jury and not for the court. That decision is controlling here."

So it appears conclusively that the judgment and opinion of the Supreme Court of Mississippi, from which this appeal is prosecuted, did not turn upon a

Federal question but upon an independent issue. Any Federal question involved in this case was involved in the previous decisions of the Supreme Court from which these parties, although bound thereby, failed to perfect an appeal to the Supreme Court of the United States. There should be an end to litigation.

That this Court will not now entertain an appeal upon the second judgment is controlled by the decision in the case of *Rio Grande Western Railway Co.* v. *Stringer*, 239 U. S. 44, 36 S. Ct. 5, wherein this Court stated:

> "Manifestly the first judgment was final within the meaning of Judicial Code, Sec. 237 (36 Stat. at L. 1156, Chap. 231 Comp. Stat. 1913, Sec. 1214). It disposed of the whole case on the merits, directed that judgment should be entered, and left nothing to the judicial discretion of the trial court (citing cases) and as the question sought to be presented arose upon the first judgment—it being final in the sense of Sec. 237—it is apparent that the writ of error addressed to the second judgment presents nothing reviewable here."

In the case at bar no appeal can now be had as to the first, and final, decision. The appeal in this instance is an attempt to seek a reversal of that prior judgment, which can not now be done. This Court is also likewise thereby concluded, the parties and the courts below being bound.

> "An appeal from the former judgment of the appellate court, or the prosecution of a writ of error therefrom, was open to appellant.

None having been presented, he can not now complain that the lower court carried out the mandate of the appellate court. The appellate court being concluded upon the last appeal by its former final adjudication, we are likewise concluded upon the present appeal. It is clear therefore that the merits of the controversy are not before us on this appeal."

Henning v. *Eldridge*, 146 Ill. 305, 33 N. E. 754.

If the decision of a Federal question by a State court is rendered unnecessary by the view of the court properly taken of the case, within the scope of the pleadings, the judgment is not open to review in the United States Supreme Court.

Chapman v. *Crane*, 123 U. S. 450, 8 S. Ct. 211, 31 L. Ed. 235.

Consolidated Turnpike Co. v. *Norfolk, etc., R. Co.*, 228 U. S. 596, 33 S. Ct. 605, 57 L. Ed. 982.

This Court can not review mere declaratory judgments.

Liberty Warehouse Co. v. *Burley Tobacco Growers Co-Op. Marketing Ass'n*, 276 U. S. 71, 48 S. Ct. 291, 72 L. Ed. 473.

There is no showing in this record wheresoever that the decision here appealed from turned upon any Federal question.

Point III.

Pleading and proof presenting exclusive or controlling Federal question, condtion for jurisdiction here, not in present record.

Appellee by intervention as well as appellant were both defendants to the original bill (No. 333, Tr. 1). Under State practice, as intervenor, appellee sued appellant, Hartford Accident & Indemnity Company, by cross-bill. As shown by decree of the chancery court oral and documentary evidence on issues present were in record additionally to agreed statement of facts.

Jurisdiction here to review is not general but limited to specific instances where Federal rights were set up in State court and denied.

> *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 86, 29 S. Ct. 220, 53 L. Ed. 417;
>
> *Michigan Sugar Co.* v. *Dix,* 185 U. S. 112, 22 S. Ct. 581, 46 L. Ed. 829.

In *San Jose Land, etc., Co.* v. *San Jose Ranch Co.,* 189 U. S. 177, 180, 23 S. Ct. 487, 47 L. Ed. 765, it was said:

> "Under the rule of the court requiring the opinions to be sent up with the record it has been frequently held to be a sufficient compliance with the words 'specially set up and claimed' that it (Federal question) was fully considered in the opinion of the court and ruled against the plaintiff in error."

No such ruling upon a Federal question appears in the opinion of the court upon which the judgment here appealed from was entered.

Here, in an intervention, where the cross-bill, other pleadings, and record disclose issues supporting the judgment of a non-Federal nature and where the proof upon which the decree was rendered does not appear, this Court is without a record upon which to reverse that done below.

Seaver v. *Bigelow*, 5 Wall. (72 U. S.) 208, 18 L. Ed. 595.

McCoy v. *Shaw*, 277 U. S. 302, 48 S. Ct. 519, 72 L. Ed. 891.

Williams v. *Oliver*, 53 U. S. (12 How.) 111, 13 L. Ed. 915.

Suydam v. *Williams*, 20 How. 427, 15 L. Ed. 980.

POINT IV.

If the court should hold that it has jurisdiction to review on this appeal, then that determined by the Mississippi Supreme Court was only an interpretation of a local contract insofar as this appellee was concerned.

In our discussion of this point with reference to the opinions and judgments of the Mississippi courts contained in that portion of the record designated by appellant's præcipe, being the record in Cause No. 333, October Term, 1931, Transcript, pages 46, 57, 67 and 86, for the reasons hereinbefore stated, it is not admitted that said opinions and judgments alone controlled and motivated the opinion and judgment of date May 1st, 1933, here appealed from, but, granting

that such was so, for the sake of this argument, then it is respectfully submitted that the appellant, Hartford Accident & Indemnity Company, is contractually liable to the appellee, and the Mississippi Supreme Court so held, interpreting the standard form of agreement between contractors and owners issued by the American Institute of Architects for use when a stipulated sum forms the basis of payment together with the other contract documents and the provisions and references contained in the performance bond.

The other appellant, Ætna Casualty & Surety Company, assumed its liability as a paid surety upon the state of the record which had been made prior to and was made upon the rendition of the judgment and decree of the Chancery Court of Adams County, Mississippi, in favor of this appellee. The parties then being bound by the prior adjudications in this case, the appellant cannot now complain of the affirmance by the Supreme Court of the State of Mississippi.

Therefore, our further discussion of this point will be with reference only to the contract liability of the appellant, Hartford Accident & Indemnity Company, and as to its liability upon its performance bond as interpreted and construed by the Mississippi courts as Mississippi contracts in the light of the other contract documents thereby adopted and referred to as a part of the bond.

The specific clause in the bond to which we now refer is in the following words:

> "Whereas, the Principal and the Obligee have entered into a certain written Contract (hereinafter called The Contract) dated October 18th,

> 1926, to construct 'Eola Hotel' building, as per plans and specifications #640 as prepared by Weiss & Dreyfous, Architects, New Orleans, La., a copy of which is or may be attached hereto *and is hereby referred to and made a part hereof''* (No. 333, Tr. 18).

Pertinent portions of said building contract, being a written contract, are included in the designated portions of this record.

The agreement, being in writing and annexed, controlled the averments of the pleader as to the rights thereunder arising. *McNeill* v. *Lee*, 79 Miss. 455; *Hanover National Bank* v. *Montgomery*, 79 Miss. 443.

Under *Union Indemnity Company* v. *Acme Blow Pipe Co.*, 117 So. 251, 150 Miss. 332, "The bond was part of the contract and the contract was made part of the bond," Mississippi laws controlling. *Ramsey & Gatlin Construction Co. et al.* v. *Vincennes Bridge Co.*, 283 U. S. 796, 75 L. Ed. 1420.

Under Article 30, quoted at length in opinion Supreme Court (No. 333, Tr. 47) on first appeal, and in the opinion on the Suggestion of Error (No. 333, Tr. 87):

> "It shall be the obligation of every contractor and sub-contractor estimating upon work under this contract operation to figure and to include within his bid to furnish a bond *in the sum and conditioned as the law of the State of Mississippi requires,* in a surety company satisfactory to the Owner or Architect. * * * The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications; it shall protect

> the Owner against all liens or claims that may be filed against the building *according to the laws of the State of Mississippi.*"

As was said in *Pennsylvania Fire Ins. Co.* v. *Gold Issue Min. & M. Co.*, 243 U. S. 95, 61 L. Ed. 616:

> "The construction of the Missouri statute thus adopted hardly leaves a constitutional question open. The defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt. *New York, L. E. & W. R. Co.* v. *Estill*, 147 U. S. 591, 37 L. Ed. 292, 13 Sup. Ct. Rep. 444. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert."

Especially when, under Article 3 (No. 333, Tr. 11), the amount to be paid the contractor was the precise amount of the bond (No. 333, Tr. 18), $316,822.00, and the statute of Mississippi (Sec. 2276, Code 1930, then in effect) provides:

> "When any contractor * * * entering into a formal contract with any person * * * for the construction of any building * * * shall

> enter into a bond with such person guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations *that such contractor * * * shall promptly make payments to all persons furnishing labor or material under said contract; and in the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond,"*

if the owner is to be free from liens as stated by the Mississippi Supreme Court (No. 333, Tr. 55). And that held by the Supreme Court of Mississippi was that this bond so thus by contract did, the Court saying (No. 333, Tr. 55):

> "In determining this question, we are to construe the bond in the light of the contract which the bond refers to, and, in so doing, it will appear *that the parties intended to execute the bond provided for and required by the contract between the owner and contractor*, and, by reference to the quoted provisions in the statement of facts, it will be seen that the contractor was required to give such a bond as was called for by Section 3 of the act; and, we think it was the intention of all the parties to give the bond therein provided for, and that the bond is to be construed in connection with the contract it was designed to protect the owner and contractor,

and that it was so dealt with by all parties. It will be seen from a recital of the bond itself that it referred to the contract, and to the plans and specifications made a part of the contract and the bond. This being true, it is plain we think that it was the intention and purpose of the parties to execute a bond in conformity with Section 3 of the Act above quoted.

"This brings the case within the decision rendered in the case of *U. S. F. & G. Co.* v. *Parsons, et al.*, 147 Miss. 335, 112 So. 469, and that case controls the present case. Consequently, it is manifest that the contractor was free to make assignments of the amount due, and that the amount assigned to the bank was a valid assignment, freed from the claims of the subcontractors, journeymen, laborers and materialmen."

This holding as to the intention of the parties under the contract is a local question. *Ramsey* v. *Gatlin, etc., Co.* v. *Vincennes Bridge Co.*, 283 U. S. 796, 75 L. Ed. 1420. Especially, as by Article 4 (No. 333, Tr. 11) of the contract, which allows payment on account on or about the 1st and 15th of each month, based on contractor's prices for labor and material, thereby each payment to be made by the owner to the contractor was conditioned by the precedent integration into the structure of materials or labor belonging to a third party.

As declared in *Lockland Lumber Co.* v. *Robinson*, 157 N. E. 376, 116 Ohio St. 725, materialmen's lien statutes do not create substantive rights but are remedial, vouchsafing additional means for enforcing payment of a debt.

Article 5 (No. 333, Tr. 12) specifically provides:

> "Before issuance of final certificate the Contractor *shall submit evidence satisfactory to the architect that all pay rolls, material bills and other indebtedness connected with the work have been paid.*"

Article 6 makes "the general conditions * * * specifications and drawings, together with this agreement, form the contract, as if hereto attached or herein repeated" (No. 333, Tr. 12).

Again (No. 333, Tr. 14):

> "*The law of the place of building shall govern the construction of this contract.*"
>
> "The contract documents are complementary and what is called for by *any one shall be* as binding as if *called for by all.*"
>
> "Article 9. *Unless otherwise stipulated, the contractor shall provide and pay for all materials, labor, tools, equipment, light, power, transportation and other facilities necessary for the execution and completion of the work.*"

Article 22, which was not brought up in transcript No. 333, but was in State transcript C. No. 29411, at page 30, provided: "If he (the contractor) should fail to make prompt payment to subcontractors or for material of labor", then the owner might take possession and complete.

Likewise, under Article 24, the Contractor had to submit to the architect an application for each payment, and if required, receipts showing payment for materials and labor (Supreme Court Miss., C. No. 29411, Tr. 31).

Likewise, Article 24, not embraced within this transcript, further provided:

> "If payments are made on account of materials delivered and suitably stored at the site but not incorporated in the work, they shall, if required by the architect, be conditional, upon submission by the Contractor of bill of sale or such other procedure as will establish the owner's title to such material or otherwise adequately protect the owner's interest" (Miss. Supreme Court, C. No. 29411, Tr. 32).
>
> "Article 30. *The owner shall have the right prior* to the signing of the contract, to require the contractor *to furnish bond covering the faithful performance of the contract and the payment of all obligations arising thereunder, in such form as the owner may prescribe and with such sureties as he may approve*" (No. 333, Tr. 15).
>
> "Article 32. Neither the final payment nor any part of the retained percentage shall become due until the Contractor, if required, shall have delivered to the owner a complete release of all liens arising out of this contract, or receipts in full in lieu thereof, and, if required in either case, an affidavit that so far as he has knowledge or information the release and receipts include all the labor and material for which a lien could be filed" (No. 333, Tr. 15).
>
> "Article 30 (No. 333, Tr. 16). *It shall be the obligation of every contractor* and subcontractor *estimating upon work under this contract operation to figure and to include within his bid to furnish a bond in the sum conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the owner* or

architect, *contractor likewise to pay the cost of any required cancellation of the same. He shall also secure and pay for lien and privilege certificate which will be required of him before final payment is made under this contract.*

"The bond shall also secure the owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi, and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary.

"Obligation of Bondsmen: The Contractor's bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contract covering the work executed hereunder. * * * "

"The sureties of the various contractors shall be, and are hereby declared and acknowledge themselves to be bound to the owner as guarantors, separately and in solido with the Contractors of the fulfillment of the terms of the foregoing."

See *Union Indemnity Co.* v. *Acme Blow Pipe Co.*, 117 So. 251, 150 Miss. 332; *Commercial Bank of Magee* v. *Evans*, 145 Miss. 643, 112 So. 482; *U. S. F. & G. Co.* v. *Parsons*, 147 Miss. 335, 112 So. 469, 53 A. L. R. 88.

We thus have a specific obligation to include in Burkes', the contractor's, bid a bond conditioned as the law of the State of Mississippi required, and by said Article 30 there is a further declaration that "the con-

tractors' bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contract covering the work executed hereunder." So, when the Indemnity Company made this obligation, a part of its bond along with the declaration that such bond was conditioned as the law of the State of Mississippi required, and then, in addition, declared: "The sureties for the various contractors shall be, and are hereby declared and acknowledge themselves to be bound to the Owner as Guarantors, separately and *in solido,* with the contractors of the fulfillment of the terms of the foregoing" (No. 333, Tr. 17). That which went before declares the absolute obligation to pay all persons for materials (Art. 9, No. 333, Tr. 14). By the execution of this bond, appellant accepted this obligation. Therefore, it received a premium computed upon the basis of the law of the State of Mississippi, requiring that appellant execute such an obligation, so securing those furnishing labor and materials; and having so thus been compelled to compute its premium as to include this obligation to pay materialmen and laborers in accordance with the law of Mississippi, it is not competent to pay losses on another and different basis, it being declared in *Insurance Company* v. *Shlenker,* 80 Miss. 667, 32 So. 155:

> "It might decline the insurance if it did not wish to run the moral risk in such a case. The very life of the statute is that the company shall not receive premiums on one basis, and pay losses on another."

So that, if it were not a fact that the Indemnity Company was not obligated to make payments to material-

men, then this provision of this bond is meaningless. It connotes responsibility for the payment which might impute injury to the surety, if certain things were left undone. But the connotation of responsibility is inescapable. Sec. 6, *et seq.*, especially enumerates those things not covered by the bond. In short, if the bond is not to make good the quality of work, nor of efficiency, nor the maintenance, nor for the payment of certain compensation for injuries, why enumerate, and especially why exclude the obligation to pay for labor and material? Note especially Sec. 7, whereunder the obligation is especially declared. This bond must be construed as a part of the plans and specifications, which are by it referred to, and by it made a portion of its obligation. Wheresoever made a portion of this obligation, there is in the bond those certain and specified provisions, that "the contractor shall provide and pay for all the materials, labor * * *" (No. 333, Tr. 14).

It so thus being, thereby Appellant conclusively must be presumed to have meant what it said, and its contract is obligatory, and operative, and materialmen may sue thereon. *Lee* v. *Newman*, 55 Miss. 374, as modified in *Washington* v. *Soria*, 73 Miss. 675. No other interpretation can hereon be placed.

Therefore, that done by the Mississippi Court was the decision of a local question under a contract the interpretation of which by the Supreme Court is here controlling. *Ramsey & Gatlin Const. Co.* v. *Vincennes Bridge Co.*, 283 U. S. 796, 75 L. Ed. 1420.

Compare *Johnson Electric Co.* v. *Columbia Casualty Co.*, 133 So. 850 (Florida 1931), where it was declared:

> "The record discloses that the bond was in the form prescribed by the American Institute of Architects, which has been examined in several jurisdictions and construed as being sufficient to protect subcontractors not formal parties to it or the contract secured by it. *American Surety Company of New York* v. *De Wald*, 30 Ga. App. 606, 118 S. E. 703, text 705; *Hartford Accident & Indemnity Company* v. *W. & J. Knox Net & Twine Company*, 150 Md. 40, 132 A. 261; *Pittsburgh Plate Glass Company, Inc., v. Fidelity & Deposit Company of Maryland*, 193 N. C. 769, 138 S. E. 143; *Mansfield Lumber Company* v. *National Surety Company*, 176 Ark. 1035, 5 S. W. (2d) 294; *Byram Lumber & Supply Company* v. *Page et al.*, 109 Conn. 256, 146 A. 293; *Fidelity & Deposit Company of Baltimore, Maryland, v. Rainer*, 220 Ala. 262, 125 So. 55."

It is true that the form here involved has been somewhat modified, but the Supreme Court of Mississippi held that the modification was not effectual to change the obligation from that therein declared.

Compare *Asheville Supply & Foundry Co.* v. *Catawba Const. Co.* (N. C. 1930), 151 S. E. 93; *Pittsburgh Plate Glass Co., Inc.*, v. *Fidelity & Deposit Co. of Maryland*, 193 N. C. 769, 138 S. E. 143; *Aetna Casualty & Surety Co.* v. *U. S. Gypsum Co.*, 39 S. W. (2d) (Ky. 1931) 234; *Concrete Steel Co.* v. *Illinois Surety Co.* (Wis. 1916), 157 N. W. 543, 163 Wis. 41; *Algonite Stone Mfg. Co.* v. *F. & Dep. Co. of Maryland* (Kans. 1917), 163 Pac. 1076, 100 Kans. 28; *Aetna Casualty & Surety Co.* v. *Big Rock Stone & Material Co.*

(Ark. 1929), 20 S. W. (2d) 180; *Leslie Lumber & Supply Co.* v. *Lawrence* (Ark. 1928), 11 S. W. (2d) 458; *Byram Lumber & Supply Co.* v. *Page*, 109 Conn. 256, 146 A. 293 (Conn. 1929); *Hartford Accident & Indemnity Co.* v. *W. & J. Knox Net & Twine Co.* (Md. 1926), 150 Md. 40, 132 A. 261; *American Surety Co. of New York* v. *DeWald* (Ga. 1923), 30 Ga. App. 606, 118 S. E. 703, text 705.

That for the contrary ruling as a matter of interpretation, compare *Central Supply Co.* v. *U. S. F. & G. Co.*, 173 N. E. (Mass. 1930) 697; *Maryland Casualty Co.* v. *Johnson*, 15 F. (2d) 253.

This statute of Mississippi is modeled upon the statute of the United States dealing with public contracts, which has been sustained and construed in *United States* v. *American Surety Co.*, 200 U. S. 200, 50 L. Ed. 441; *Mankin* v. *United States*, 215 U. S. 236, 54 L. Ed. 316; *Illinois Surety Co.* v. *John Davis Company*, 244 U. S. 375, 61 L. Ed. 1206.

It was perfectly competent for the Mississippi Court, as a matter of intention, to segregate this bond into two obligations, one in favor of the owner, the other in favor of the materialmen, the contract so thus reading. *United States* v. *National Surety Co.*, 34 C. C. A. 528, 92 Fed. 551; *Dewey* v. *State*, 91 Ind. 173; *Doll* v. *Crume*, 41 Neb. 655, 59 N. W. 806; *Steffes* v. *Lemke*, 40 Minn. 97; *Kansas City Hydraulic Press Brick Co.* v. *Natl. Surety Co.* (Mo. 1906), 149 Fed. 507; *U. S. F. & G. Co.* v. *Omaha*, 116 Fed. 145; *Pingrey on Suretyship and Guaranty*, Sec. 112, 1. 139.

Further, this contract by a paid surety is to be most favorably interpreted for Appellee. *American Life*

& Accident Ins. Co. v. *Nirdlinger,* 113 Miss. 74, 73 So. 875; *United States Fidelity & Guaranty Co.* v. *Citizens State Bank of Moorhead,* 116 So. 608, 150 Miss. 386.

With Appellant in the business for profit it unquestionably computed the premium upon the basis of this imposition and as said in *Byram Lumber & Supply Co.* v. *Page,* 109 Conn. (1929) 256, 146 A. 293:

> "It would be to close our eyes to the ordinary methods of such a business as it was conducting to doubt that it knew of the diverse views taken in regard to the construction of such bonds in different states; that it did not stand ready to accept a construction favorable to a direct action by persons situated like the plaintiff, if we should so construe the bond, and did not fix its premium accordingly. In that construction there can be no injustice to the appellant, and we can recognize the sound policy which it will serve."
>
> *U. S. F. & G. Co.* v. *United States,* 191 U. S. 416, 24 S. Ct. 142, 48 L. Ed. 242, 246.

The Indemnity Company, doing business in Mississippi where all such obligations had been specifically sitused (Sec. 5818, Hemingway's Code, 1927, quoted in *Fidelity Mutual Ins. Co.* v. *Miazza,* 93 Miss. 18, 46 So. 817), agreed that it would be bound in manner and form as by the law of the State of Mississippi required, and that its bond was to be "in the sum and conditioned as the law of the State of Mississippi requires" (No. 333, Tr. 17). The requirements of the

law of the State of Mississippi cannot now be in doubt. This act was on the statute books, plain and unambiguous, and being so thus, the Appellant was admitted to do business upon condition of compliance with all laws of the State of Mississippi (Section 5136, Code 1930), and this was one.

As said in *Union Indemnity Co.* v. *Acme Blow Pipe Co.*, 117 So. 251, 150 Miss. 332:

> "It would be far better for those corporations, whose existence and maintenance depends upon following the law, to observe it rather than to flout it, or seek to contract against it. They are under no compulsion to make such bonds, but if they make them, such bonds will be construed and applied as if they had complied with the law."

The bond which it executed specifically declares (No. 333, Tr. 18):

> "Whereas, the Principal and the Obligee have entered into a certain written contract (hereinafter called the contract) dated October 18, 1926, to construct 'Eola Hotel' building as per plans and specifications * * * a copy of which is or may be attached hereto, and is hereby referred to and made a part hereof."

Hence, a specific obligation definitely set out was there referred to, and by said Article 30 it was expressly provided that in addition there is "also the bond should secure the owner the full and faithful performance of the contract."

We thus have a specific obligation to include in Burke's bid a bond conditioned as the law of the State of Mississippi required, and by said Article 30 there is a further declaration that "the contractors' bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contract covering the work executed hereunder," so, when the Indemnity Company made this obligation a part of its bond along with the declaration that such bond was conditioned as the law of the State of Mississippi required, and then, in addition, declared: "The sureties for the various contractors shall be, and are hereby declared and acknowledge themselves to be bound to the Owner as Guarantors, separately and *in solido* with the contractors of the fulfillment of the terms of the foregoing" (No. 333, Tr. 17). That which went before declared the absolute obligation to pay all persons for materials (Art. 9, No. 333, Tr. 14). Its meaning as a contract is solely a State question. *Ramsey & Gatlin Con. Co.* v. *Vincennes Bridge Co., supra.*

This Court has been liberal in protecting materialmen and sustaining the validity of legislation to that end. *Great Southern Fire Proof Hotel Co.* v. *Jones,* 193 U. S. 540, 48 L. Ed. 787; s. c., 30 C. C. A. 108, 86 Fed. 371.

We therefore submit that the judgment should be affirmed because based upon a construction of a local contract, even though the Federal question was raised, for the local question is an adequate basis for the decision rendered. *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 8, 75 L. Ed. 134; *Susquehanna*

Power Co. v. *State Tax Com.*, 283 U. S. 300, 75 L. Ed. 1049; *Atchison, T. & S. F. R. Co.* v. *Railroad Com.*, 283 U. S. 390, 75 L. Ed. 1136.

Respectfully,

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All italics ours.

Service of copy of the foregoing Statement, Motion, and Brief is hereby acknowledged.
This June 19th, A. D. 1933.

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